(3)

No. 87-2098

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV,
SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIEF FOR THE APPELLANT

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35 pp

QUESTION PRESENTED

The Department of Transportation administers pipeline safety programs under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.*, and the Hazardous Liquid Pipeline Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.* Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a), directs the Secretary of Transportation to recover the costs of administering those two pipeline safety programs by assessing and collecting fees from pipeline operators. The question presented is whether Section 7005 is an unconstitutional delegation of the legislative power of taxation.

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OPINIONS BELOW

The Findings and Recommendations of Magistrate (J.S. App. 1a-13a) are unreported. The Order of the district court adopting the Magistrate's recommendations (J.S. App. 14a) is also unreported.

JURISDICTION

The judgment of the district court (J.S. App. 15a-16a) was entered on February 9, 1988. A notice of appeal was filed on March 9, 1988 (J.S. App. 17a-18a). On April 29, 1988, Justice White entered an order extending the time within which to docket this appeal to and including June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. The Court noted probable jurisdiction on October 3, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1, of the Constitution provides, in pertinent part: "All legislative Powers herein granted shall be vested in a Congress of the United States * * *."

Article I, Section 8, provides in pertinent part: "The Congress shall have Power to lay and collect Taxes, [and] * * * [t]o regulate Commerce * * * And * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Article II, Section 3, provides in pertinent part, that the President "shall take Care that the Laws be faithfully executed."

Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) provides:

PIPELINE SAFETY USER FEES.

(a) ESTABLISHMENT.

(1) SCHEDULE.—The Secretary of Transportation (hereafter in this section referred to as the "Secretary") shall establish a schedule of fees based on the usage, in a reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines. In establishing such schedule, the Secretary shall take into consideration the allocation of departmental resources.

(2) COLLECTION.—The Secretary shall establish procedures for the collection of such fees. The Secretary may use the services of any Federal, State, or local agency or instrumentality to collect such fees, and may reimburse such agency or instrumentality a reasonable amount for such services.

(3) LIABILITY.—Fees established under this section shall be assessed to the persons operating—

(A) all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.); and

(B) all pipeline transmission facilities and all liquefied natural gas facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.).

(b) TIME OF ASSESSMENT.—The Secretary shall assess and collect fees described in subsection (a) with respect to each fiscal year before the end of such fiscal year.

(c) USE OF FUNDS.—Funds received under subsection (a) shall be used, to the extent provided for in advance in appropriation Acts, only—

(1) in the case of natural gas pipeline safety fees, for activities authorized under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.); and

(2) in the case of hazardous liquid pipeline safety fees, for activities authorized under the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.).

(d) FEE SCHEDULE.—Fees established by the Secretary under subsection (a) shall be assessed against all natural gas and hazardous liquids transported by pipelines subject to the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979 after September 30, 1985, and shall be sufficient to meet the costs of activities described in subsection (c), beginning on October 1, 1985, but at no time shall the aggregate of fees received for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.

STATEMENT

1. In 1986, Congress enacted the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82. Section 7005 of COBRA, 100 Stat. 140-141,

directs the Secretary of Transportation (Secretary) to adopt a system of fees to cover the costs of federal pipeline safety programs administered by the Department of Transportation (DOT) under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.*, and the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.*[1] Section 7005(a)(3), 100 Stat. 140, states that the fees "shall be assessed to the persons operating" pipeline facilities subject to the two safety Acts. The fees must be assessed prior to the end of each fiscal year (§ 7005(b), 100 Stat. 140), and must be sufficient to pay the costs of the two safety programs as "provided for in advance in appropriation Acts" (Section 7005(c), 100 Stat. 141). Section 7005(a)(1) of COBRA, 100 Stat. 140, directs the Secretary to base the fee schedule "on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines."

2. On July 16, 1986, the Secretary published fee schedules adopted pursuant to Section 7005 (J.A. 34-41). The Secretary selected "pipeline mileage" as the appropriate measure of each firm's fee. The Secretary reasoned that pipeline mileage is closely related to the covered regulatory costs (*e.g.*, the cost of inspection of pipelines). And the Secretary observed that the major pipeline trade associations had reached a consensus that "pipeline mileage provides the most reasonable basis for determining fees to be paid by operators of gas transmission lines and hazardous liquid pipeline facilities" (*id.* at 35). For fiscal year 1986, the Secretary set fees of $23.99 per mile for gas pipelines and $6.41 per mile for hazardous liquid pipelines (*id.* at 38).[2]

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[1] Those Acts, in general, authorize the Secretary to establish national pipeline safety standards and to ensure compliance with those standards through enforcement measures including inspection.

[2] The federal program costs for the two pipeline safety programs were allocated 80% to gas pipelines and 20% to hazardous liquid pipelines (J.A. 37). Total federal costs of both programs for fiscal years 1986, 1987, and 1988 were $7.773 million, $8.523 million, $8.550 million, respectively. The projected federal costs for 1989 are $9.3 million. Department of Transportation

3. Appellee Mid-America Pipeline Company owns and operates pipelines that transport hazardous liquids. As such, appellee is subject to the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2000 *et seq.* (Complaint para. 3). On July 28, 1986, DOT, acting under its published schedule of fees, assessed appellee $53,023.52 to cover its share of the costs of administering the safety act (para. 10). Appellee then filed this suit, asserting that Section 7005 of COBRA is an unconstitutional delegation of Congress's taxing power. The district court referred the parties' cross-motions for summary judgment to Magistrate John Leo Wagner for a recommended decision.

On August 5, 1987, the Magistrate issued findings and recommendations (J.S. App. 1a-13a). The Magistrate stated that there were no genuine issues of material fact, and that two legal issues were presented: "(1) [W]hether the 'user fees' contemplated by § 7005 are fees or taxes, and (2) if § 7005 imposes a tax, whether Congress may delegate the taxing power in this manner" (*id.* at 1a-2a (footnote omitted)). The Magistrate concluded "that 'the fees' assessed under § 7005 are taxes" (*id.* at 5a). The Magistrate then discussed, but neither accepted nor rejected, appellee's contention that Congress is subject to special restrictions with respect to delegation of its taxing power (*ibid.*). Instead, the Magistrate (*id.* at 6a-11a) purported to analyze Section 7005 in light of this Court's decisions in *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394 (1928), and *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946). The Magistrate found that Section 7005 leaves "the Secretary * * * free to appropriate the cost of regulation in almost any way [he] sees fit" (J.S. App. 9a). By not specifying the fee schedules, the Magistrate declared, Congress has permitted the Secretary to charge a company "almost any figure from 0-100% of the entire [pipeline safety] appropriation" (*id.* 10a).[3] The Magistrate concluded that

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and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-457, 102 Stat. 2143-2144.

[3] The Magistrate used a sample of six pipeline companies to show how the assessments could vary in accordance with the method of assessment selected

Section 7005 is unconstitutional because "[t]his statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use [his] discretion and set the rate of fees which is in fact a tax, and then go one step further and collect such taxes" (*ibid.*).

The Secretary filed exceptions to the Magistrate's report. On December 30, 1987, however, the district court entered a brief order (J.S. App. 14a) adopting the Magistrate's recommendations. On February 9, 1988, the district court entered a judgment (*id.* at 15a-16a) declaring Section 7005 unconstitutional and enjoining the Secretary from enforcing that section against appellee. The district court stayed its judgment pending appeal.

SUMMARY OF ARGUMENT

1. The separation of powers required by the Constitution does not forbid the Congress from giving the Executive Branch the authority to make subordinate rules to implement congressional will. Rather, Congress fulfills its constitutional role if it passes a law that announces Congress's general policy, designates the part of the Executive Branch that is to implement it, and sets out the boundaries of the Executive's authority. Under that test, this Court has repeatedly upheld statutes challenged on non-delegation grounds.

2. Congress's power to tax is not subject to greater restrictions on delegation than its other legislative powers enumerated in Article I of the Constitution. The language of the Constitution does not draw a distinction between Congress's various powers in terms of the permissible degree of discretion that may be conferred on the Executive Branch. Nor is there any evidence that the Framers of the Constitution made such a distinction.

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by the Secretary (J.S. App. 9a-10a, 12a-13a). The Magistrate found that appellee could have been charged anywhere from 5% to 28.3% of Congress's appropriation for the program (*id.* 9a). The figures that the Magistrate used were contained in an exhibit submitted by appellee that had been ruled inadmissible (J.A. 29).

The ratified Constitution gave the Congress sweeping powers to pass tax laws. The early congresses used the taxing power to pass general tax measures that called upon the Executive to make choices in implementing the laws. That early practice is persuasive evidence that Congress's power to tax is not subject to special restrictions against delegation.

Nothing in this Court's decision in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), casts doubt on the ability of Congress to pass a law that confers discretion on the Executive in matters related to taxation. When the opinion in that case is read in context and in light of this Court's later decisions, it is clear that *National Cable Television Ass'n* stands for the proposition that a tax statute, like any other act of Congress, is constitutional if it sets forth Congress's policy and channels the administrative process by defining the boundaries of the Executive's discretion.

3. Even if the Constitution does distinguish between the taxing power and other Article I powers for the purposes of the non-delegation doctrine, we believe that Section 7005 of COBRA should not be viewed as imposing a "tax." This Court has held that the government is not imposing a "tax," in the strict sense used by the Constitution, when it requires an entity to pay the costs of a government program made necessary by that entity's commercial activities. Rather, the government is imposing a "fee" that is properly viewed as one of the costs of doing business. Appellee is in the business of transporting hazardous liquids through pipelines. That activity imposes certain social costs as evidenced by the expense of administering the Hazardous Liquid Pipeline Safety Act. Section 7005 is designed to recover those costs by assessing fees on those persons responsible for creating the need for the government program.

4. Section 7005, when tested under the established non-delegation standards, does not delegate excessive authority to the Executive. The statute specifies the total amount of fees and the parties who are responsible for paying those fees. Section 7005 sets forth the exclusive factors that the Secretary may con-

sider, and it requires the fee schedules to be reasonable. The validity of Section 7005 is especially apparent when that provision is compared to other statutes that this Court has upheld against non-delegation challenges.

ARGUMENT

CONGRESS ACTED CONSTITUTIONALLY WHEN IT GAVE THE SECRETARY OF TRANSPORTATION DISCRETION TO SELECT AMONG PRESCRIBED METHODS FOR ASSESSING FEES TO RECOVER THE COSTS OF THE GOVERNMENT'S PIPELINE SAFETY PROGRAMS

I. *Introduction*

The Constitution divides the federal government "into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). The legislative power granted by Article I "is the authority to make laws." *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189, 202 (1928). The executive power created by Article II includes the authority to "take Care that the Laws be faithfully executed" (Art. II, § 3). And the judicial power conferred by Article III consists of the authority, in appropriate cases and controversies, "to say what the law is" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and whether the law has been violated. The Framers intended that those separate functions would serve as "the foundation of a structure of government that would protect liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986).

The separation of powers required by the Constitution is not violated simply because Congress gives the Executive Branch the authority to implement congressional policies by adopting "quasi-legislative" (*Wright* v. *Nagle*, 101 U.S. 791, 792-793 (1879)) rules of general application. Congress fulfills its constitutional role when it "delineates the general policy, the public agency which is to apply it, and the boundaries of [the] delegated authority" *American Power & Light Co.* v. *SEC*,

329 U.S. at 105. When Congress legislates in that manner, the Executive Branch is able "to understand the[] limits" of the law, *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574 (1939), and the Judicial Branch, when presented with a case challenging Executive action, is able "to ascertain whether the will of Congress has been obeyed," *Yakus* v. *United States*, 321 U.S. 414, 426 (1944). Hence, it has long been recognized that Congress may call upon the Executive Branch to implement congressional policies by making "subordinate rules within prescribed limits" (*Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935)). Accord, *e.g.*, *The Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382 (1813); *Field* v. *Clark*, 143 U.S. 649, 683 (1892); *United States* v. *Grimaud*, 220 U.S. 506 (1911); *Erie R.R.* v. *Board of Public Utility Comm'rs*, 254 U.S. 394, 413 (1921).

This Court has repeatedly rejected claims that particular acts of Congress have unconstitutionally delegated legislative power to the Executive. The only notable exception occurred in 1935, when the Court in two cases struck down portions of the National Industrial Recovery Act of 1933 as unconstitutionally delegating the power to enact legislation. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan, supra.*[4] The invalidated provisions called for the creation of codes of fair competition for the entire economy, bypassed the normal administrative process, and "supplie[d] no standards for any trade, industry or activity" (*A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541). The law created what Justice Cardozo described as "a roving commission to inquire into evils and upon discovery correct them" (*id.* at 551 (concurring opinion)). As such, Justice Cardozo called the challenged law "delegation running riot" (*id.* at 533).

In the 53 years since *Schechter Poultry* was decided, however, the Court has repeatedly and uniformly upheld statutes challenged on non-delegation grounds. See, *e.g.*, *FEA* v. *Algonquin*

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[4] See also *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 310-311 (1936) (holding unconstitutional a similar provision of the Bituminous Coal Conservation Act of 1935 that delegated the power to set wages and hours of production to a non-governmental body).

SNG, Inc., 426 U.S. 548, 559 (1976); *United States* v. *Mazurie*, 419 U.S. 544 (1975); *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *Lichter* v. *United States*, 334 U.S. 742 (1948); *Yakus* v. *United States, supra*; *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Currin* v. *Wallace*, 306 U.S. 1 (1939). Section 7005 of COBRA falls squarely within this tradition. It sets forth Congress's policy determination, and calls upon the Executive to implement that policy by making "subordinate rules within prescribed limits" (*Panama Refining Co.* v. *Ryan*, 293 U.S. at 421).

II. *Congress's Power To Tax Is Not Subject To Greater Restrictions On Delegation Than Its Other Article I Powers*

Appellee does not seriously contend that Section 7005 is less precise or that it gives the Executive more open-ended authority over a larger field of regulation than the many statutes that this Court has upheld against non-delegation claims. Rather, appellee maintains (Mot. to Aff. 5-17) that Section 7005 is different because it authorizes the imposition of a tax, and only Congress may make choices involving taxation.[5] Appellee's claim is wrong; neither the language or the history of the Constitution, nor settled practice, nor this Court's decisions sup-

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[5] The length of the Internal Revenue Code (Title 26) suggests that Congress often legislates with considerable precision in the area of taxation. But Congress has also chosen to give the Executive significant discretionary authority in executing Congress's tax policies. See generally *Bob Jones University* v. *United States*, 461 U.S. 574, 596-597 (1983). For example, Congress has given the Secretary of the Treasury broad authority to prescribe "all needful rules and regulations for the enforcement of this Title," including the authority to determine whether such rules should be given "retroactive effect." 26 U.S.C. 7805(a), (b). Congress has also directed the Secretary to prescribe regulations for the filing of consolidated tax returns "in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability * * *" (26 U.S.C. 1502). And to ensure proper collection of the Windfall Profit Tax on oil companies, Congress has instructed the Secretary of the Treasury to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this chapter" (26 U.S.C. 4997).

port the proposition that Congress's power to tax is subject to greater restriction on delegation than are its other legislative powers.

A. The language of the Constitution does not support appellee's claim. Article I, Section 8, of the Constitution sets forth the many powers of Congress. One of those powers is the "Power To lay and collect Taxes." Article I, however, does not distinguish the taxing power from any of the other enumerated powers (*e.g.*, the power to borrow money or to regulate commerce) in terms of the extent to which Congress may call upon the Executive to exercise discretion in carrying out congressional policies. Thus, there is no textual basis for concluding that Congress may give the Executive authority to make subsidiary rules governing such matters as maximum prices (see *Sunshine Anthracite Coal Co.* v. *Adkins, supra*) or unfair competition (see *FTC* v. *Keppel & Bro.*, 291 U.S. 304 (1934)), but not taxes. This Court recognized that point in *Lichter* v. *United States*, when it stated that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes" (334 U.S. at 778-779 (emphasis omitted)). Accord *Florida Power & Light Co.* v. *United States*, 846 F.2d 765 (D.C. Cir. 1988) (rejecting claim that Congress's power to set rules relating to taxation is non-delegable), cert. pending, No. 88-234; *Synar* v. *United States*, 626 F. Supp. 1374, 1385 (D.D.C.) (Scalia, Johnson, Gasch, J.J.) (per curiam) (rejecting contention that there are "core functions" that Congress may not delegate to the Executive), aff'd on other grounds, 478 U.S. 714 (1986).

Nor does the language of Article II of the Constitution forbid the Executive to make discretionary judgments when executing tax laws. Article II, Section 3, broadly provides that the President "shall take Care that the Laws be faithfully executed." It does not say, as appellee's argument necessarily implies, that the President and his officers may use their discretion when executing all laws except those that raise money. In sum, the constitutional rule that appellee posits—*i.e.*, that Congress must legislate with unusual specificity in the tax areas—is surely not found in the language of the Constitution.

B. Appellee nevertheless contends (Mot. to Aff. 10-12) that its claim is supported by concerns expressed by the Framers of the Constitution. Indeed, there was a sharp debate at the constitutional convention and during the ratification process about the federal government's power to tax. But that debate and its outcome have little to do with the question posed by appellee—whether Congress may pass laws that call upon the Executive to implement Congress's policy by adopting subordinate rules.

The principal debate over taxes at the constitutional convention was whether the federal government should have any power to levy taxes at all. George Mason argued that the federal government should not be given that power because the "unconditional power of taxation * * * cannot but oppresss the people." 2 P. Kurland & R. Lerner, *The Founders' Constitution* 438 (1987). He contended that the federal government should rely on the states to raise taxes, which could then be requisitioned by the federal government, because the states "are acquainted with the[] condition and circumstances" of the people (*ibid.*). James Madison strongly disagreed. Madison stated: "I trust we shall find that part [of the Constitution] which gives the general government the power of laying and collecting taxes indispensable, and essential to the existence of any efficient or well-organized system of government" (*id.* at 436). Madison's view, of course, prevailed at the convention and during the ratification process. See generally 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 467 (2d ed. 1836) (statement of James Wilson at the Pennsylvania Ratifying Convention) ("Congress should possess the power of raising revenues from their constituents"). As a result, the enumerated powers of Congress in Section 8 of Article I of the Constitution include the power to tax.

We are aware of no debate at the constitutional convention that addressed the issue of how precisely Congress must legislate when it passes a tax statute. There is simply no evidence that the Framers believed the Taxing Clause in Article I imposed special

requirements of specificity on Congress.[6] Indeed, an opponent of the proposed Constitution clearly understood that a tax law, like other acts of Congress, might call upon the Executive to use its discretion in executing the statute. This anti-federalist wrote:

> The general legislature will be empowered to lay any tax they chuse, to annex any penalties they please to the breach of their revenue laws; and to appoint as many officers as they may think proper to collect the taxes. They will have authority to farm the revenues and *to vest the farmer general, with his subalterns, with plenary powers to collect them, in any way which to them may appear eligible.*

P. Kurland & R. Lerner, *supra*, at 418 (reprinting *Brutus*, No. 6) (emphasis added)).

At bottom, appellee is arguing that the drafters of the Taxing Clause intended to include in that provision an implicit limitation not found in the other enumerated powers of Congress—that Congress may enact a law that raises revenue *only if* that law gives the Executive no (or perhaps only very little) discretion in its implementation. But Hamilton noted at the convention that "the national government should possess an *unrestrained* power of taxation" (P. Kurland & R. Lerner, *supra*, at 422 (emphasis added)). And Justice Chase in his opinion for this Court in 1796 noted that "[t]he great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government." *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171, 173 (1796). Thus, appellee is wrong in asserting that the Framers must have silently meant to limit

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[6] Appellee cites (Mot. to Aff. 11 n.9) Madison's comment that "[t]he legislative department alone has access to the pockets of the people" (The Federalist No. 48, at 310 (C. Rossiter ed. 1961)). That is undoubtedly correct, but it only means that Congress must pass tax laws; the President and Article III judges cannot create taxes on their own. Madison's comment, however, has nothing to do with this case. Congress duly enacted Section 7005; the Secretary of DOT did not act independently. The only issue here is whether Congress made Section 7005 precise enough to satisfy the Constitution's principle of the separation of powers.

Congress's Article I power "To lay and collect Taxes" in a manner not applicable to other Article I powers, such as the powers "To borrow Money" and "To regulate Commerce." See generally 2 J. Story, *Commentaries on the Constitution of the United States* § 920 (2d ed. 1851) (the Constitution "gives the power to tax, as a substantive power; and gives others, as equally substantive and independent").[7]

C. The practice of early Congresses further confirms that Congress may rely upon the Executive to make choices when implementing tax laws. See generally *Field* v. *Clark*, 143 U.S. 649, 683 (1892) (long practice of Congress in delegating authority to the President "is entitled to great weight"). The First Congress imposed duties on certain distilled beverages and set down penalties for failing to pay the required taxes. See Act of March 3, 1791, ch. 15, 1 Stat. 199. In that law, Congress gave "the secretary of the treasury of the United States" the "power to mitigate or remit such penalty or forfeiture * * * upon such terms and conditions as shall appear to him reasonable" (*id.*, § 43, 1 Stat. 209). The Third Congress authorized the President "to form and erect [taxing] districts * * * as from time to time shall appear, in his judgment, expedient and necessary" to collect taxes on distilled spirits (Act of June 5, 1794, ch. 49, § 1, 1 Stat. 378). And perhaps most instructive is a law passed by the Fifth Congress in 1797. That Congress passed a law (Act of July 6, 1797, ch. 11, 1 Stat. 527) levying stamp duties on certain

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[7] Appellee notes (Mot. to Aff. 10-12) the requirement in the Constitution that all bills "raising Revenue" originate in the House of Representatives (Art. I, § 7, Cl. 1). Contrary to appellee's suggestion, however, that provision does not state that the resulting law may not confer upon the Executive Branch the same degree of discretionary authority as other statutes not raising revenues. The Origination Clause is simply silent on the topic of delegation of authority. Nor does the broad purpose behind the Origination Clause support appellee's argument; if anything, the opposite is true. The Framers apparently included the Origination Clause in the Constitution because they thought that the House of Representatives would "possess more ample means of local information" (2 J. Story, *supra*, § 873). Today, in a much more complex society, Congress could rationally conclude that only by conferring broad authority on the Executive to investigative conditions in particular industries would sufficient "local information" be generated to allow satisfactory fee schedules to be fixed.

types of bank papers. Congress, however, authorized the Secretary of the Treasury, in lieu of collecting the stamp duty, "to agree to an annual composition for the amount of such stamp duty, with any of the said banks, of one per centum on the amount of annual dividend made by such banks" (§ 2, 1 Stat. 528).

In short, the early Congresses passed tax measures that called upon the Executive Branch to make "reasonable" judgments, to do what was "expedient and necessary," and to make choices concerning the measure of a taxpayer's liability. Those early enactments provide " 'contemporaneous and weighty evidence of the Constitution's meaning' " since many Members of the early Congresses " 'had taken part in framing that instrument' " (*Bowsher* v. *Synar*, 478 U.S. at 723-724, quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)).

D. Appellee chiefly relies (Mot. to Aff. 5-10) on *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), in arguing that Congress's power to tax carries with it special rules of non-delegation. Appellee's heavy reliance on *National Cable Television Ass'n*, however, is misplaced. In fact, this Court's decisions confirm what is plain from the text, history, and practice of the Constitution—that Congress's power to enact tax laws is no different for non-delegation purposes from its other Article I powers.

In *J.W. Hampton Jr., & Co.* v. *United States, supra,* the Court considered a challenge to a statute giving the Executive broad authority to set tariffs (a type of tax) on imported goods. The Court rejected the argument, also advanced by appellee here, that Congress may not "use executive officers in the application and enforcement of a policy declared in law by Congress * * * where Congress has exercised the power to levy taxes and fix customs duties" (249 U.S. at 409). The Court stated (*ibid.* (emphasis added)):

> The *same principle* that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in

> accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

Thus, *J. W. Hampton* expressly rejected a hierarchy of authority among Congress's Article I powers for purposes of the non-delegation doctrine.

Appellee nevertheless contends that this Court's decision in *National Cable Television Ass'n* v. *United States, supra,* adopted a stricter standard for delegation under the taxing power than applies to the exercise of other congressional powers. Although there is language in *National Cable Television* that, if taken out of context, can be read to support that contention, a careful reading of the opinion reveals that the Court was not drawing any distinction between the power of taxation and other sources of congressional authority. In *National Cable Television Ass'n,* the Court considered the power of federal agencies to assess fees under the Independent Offices Appropriation Act (IOAA), 1952, 31 U.S.C. 9701. The IOAA allows agencies to collect fees that are measured by "the value * * * to the recipient" of the agency's service, and it also permits agencies to consider the "public policy or interest served; and other relevant facts." 31 U.S.C. 9701(b)(2)(B), (C) and (D). In considering fees set by the Federal Communications Commission under the IOAA, the Court observed that "[t]axation is a legislative function," and that Congress "is the sole organ for levying taxes" (415 U.S. at 340). The Court also distinguished between "taxes" and "fees," and noted that it "would be a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power" (*id.* at 340-341). But those statements—which are surely correct—simply mean that the Executive may not collect taxes without congressional approval. They say nothing about whether Congress may rely on the Executive to use its discretion in implementing Congress's tax laws.

The Court next went on to discuss the separation-of-powers principle of *Schechter Poultry* and *J. W. Hampton* and concluded: "Whether the present Act meets the requirement of

Schechter and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems" (*id.* at 342). Then, in order to avoid the constitutional difficulties that an expansive reading of the IOAA might present under *Schechter Poultry* and *J.W. Hampton*—which of course set forth the *general* standards for non-delegation of congressional power—the Court read the Act to permit the Federal Communications Commission to set fee amounts based on the "value to the recipient" of the Commission's services, but not to allow fees to be set on the basis of the "protective services rendered the public" in general (*id.* at 341). Accordingly, *National Cable Television Ass'n* stands for only the proposition (415 U.S. at 342) that a law that confers discretion on the Executive in matters related to raising revenue, like any other statute challenged on non-delegation grounds, is constitutional if it satisfies the principles announced in *Schechter Poultry* and *J.W. Hampton*. See *Florida Power & Light Co.*, 846 F.2d at 772-775.[8]

Later decisions make clear that the Court in *National Cable Television Ass'n* did not intend to establish a new and more restrictive non-delegation doctrine for tax cases. In *FEA* v. *Algonguin SNG, Inc., supra,* decided one year after *National Cable Television Ass'n,* the Court considered a non-delegation challenge to the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, which allowed the President to raise license fees on imports when he found that such action was needed to

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[8] Thus, we agree with the following observation of two commentators:

> Justice Douglas's opinion in *National Cable Television* does state that Congress is "the sole organ for levying taxes," but there is little reason to believe that congressional monopoly over taxation prevents its delegation, properly constrained by safeguards and standards, any more than congressional autonomy over interstate commerce precludes delegation of that power. What Justice Douglas appears to have been suggesting is that in the case of the IOAA there is no evidence that Congress *had* delegated the taxation power.

Gillette & Hopkins, *Federal User Fees: A Legal and Economic Analysis,* 67 B.U.L. Rev. 795, 823 (1987).

protect the national security. The Court, applying the traditional non-delegation test of *J.W. Hampton,* upheld that Act giving discretionary authority to the President in the area of taxation. Without even suggesting that Congress's power of taxation is subject to special requirements of specificity, the Court explained its prior decision in *National Cable Television Ass'n* this way:

> In *National Cable Television,* we held that the fees to be imposed [under the IOAA] should be measured by "the value to the recipient" even though the language of the general statute * * * permits consideration * * * also of "public policy or interest served, and other pertinent facts." The Court's conclusion that the words of the last-quoted phrase were not relevant * * * was apparently motivated by a desire to avoid any delegation doctrine problem that might have been presented by a contrary conclusion. But what might be considered the open-ended nature of the phrase "public policy or interest served, and other pertinent facts" stands in contrast to [the Trade Expansion Act's] more limited authorization of the President to act only to the extent necessary to eliminate a threat of impairment to the national security * * *.

426 U.S. at 560 n.10. *Algonguin SNG* thus confirms that the Court in *National Cable Television Ass'n* interpreted the IOAA narrowly,[9] not because the statute was enacted under Congress's Article I taxing power, but because of the "open ended nature of the phrase 'public policy or interest served, and other pertinent facts' " (*ibid.*).[10]

[9] In this case, there is no question of statutory interpretation. Appellee does not contend that the Secretary's fee schedule is contrary to congressional intent as expressed in Section 7005 of COBRA.

[10] If *National Cable Television Ass'n* were read as imposing a stricter standard for the delegation of authority in the field of taxation, but not an absolute bar, then this Court would have to create a new non-delegation standard for Congress's taxing power. No such stricter, yet workable, standard easily comes to mind. Before the Magistrate, appellee argued that Congress must make all "fundamental" choices (J.A. 10). That standard, however, appears to be no different from the traditional tests of *American Power and Light* and *J.W.*

More recently, in *Bob Jones University* v. *United States,* 461 U.S. 574 (1983), the Court considered the contention that only Congress, rather than the Internal Revenue Service, has the power to change an established interpretation of the general provisions of the Internal Revenue Code. The Court rejected that claim in emphatic terms (*id.* at 596-597):

> [E]ver since the inception of the Tax Code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as a tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems. * * * Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will.

E. The major premise of appellee's entire argument is that we would have a more representative and responsible government if Congress approved all, or virtually all, governing legal norms that affect the people of this country. Whatever the merits of that contention, it was not the theory of government adopted by the Constitution. Prior to the Constitution, Locke observed that the "Assemblies of the Legislative" could not "answer all the Exigencies of the Commonwealth;" consequently, "the best remedy * * * was to trust this to the prudence of one [the Executive], who was always to be present, and whose business it was to watch over the public good" (J. Locke, *Second Treatise* § 156 (1689)). The Framers of our Constitution agreed, and created an independent Executive whose job is to execute the laws of Congress. Moreover, they made the President "a representative of the people just as the members of the

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Hampton, which require Congress to set forth its general policy, the boundaries of the delegated authority, and intelligible principles to which the Executive must conform. The difficulty in articulating and applying a stricter standard in the tax area is further evidence that the Constitution does not require such a standard.

Senate and of the House are." *Myers* v. *United States,* 272 U.S. 52, 123 (1926).

The Constitution makes Congress the supreme lawmaker, but with that grant of power comes the authority to ask for assistance from the coordinate branches of government. As the Court noted in *Panama Refining Co.,* 293 U.S. at 421:

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to subordinate instrumentalities the making of subordinate rules within prescribed limits * * *. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.

When the Congress asks for help from the Executive Branch, the "Executive action is always subject to check by the terms of the legislation that authorized it." *INS* v. *Chadha,* 462 U.S. at 953 n.16. And Congress may investigate the manner in which its laws are being executed, determine whether congressional policy is being fulfilled, and modify its legislation if necessary. See W. Gwyn, *The Meaning of Separation of Powers* 102 (1965) (Congress is uniquely able "to examine in what manner the laws that it has made have been executed"). The principle of separation of powers has little or nothing to say about a decision by Congress to delegate some discretionary authority to the Executive, all the time retaining the power, through the enactment of legislation, to reverse specific Executive action and even to recall the Executive's power to act.

Congress made the basic political choices in this case. Congress decided that there should be federal programs to ensure pipeline safety. Each year, Congress decides how much those

programs will cost. And in Section 7005 of COBRA, Congress decided who would pay for the programs—pipeline operators. This is not a case, as appellee contends (Mot. to Aff. 11), where "the taxing power" was kept out of "the hands of a representative body." The basic political battle was fought in Congress, and pipeline operators clearly lost. See generally *INS* v. *Chadha,* 462 U.S. at 966 (Powell, J., concurring in judgment) "Congress is most accountable politically when it prescribes rules of general applicability."). There is no reason to suppose that the fee scheme would be more rational or equitable if Congress were required to make every choice. See generally Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. Econ. & Org. 1 (1985).

III. ***The Fees Collected Under Section 7005 Are Not Taxes***

For the reasons set forth above, we believe that the Constitution draws no distinction between the taxing power and other Article I powers for purposes of the non-delegation doctrine. But even if it does, we do not believe that Section 7005 of COBRA should be categorized as imposing a "tax" in the constitutional sense. That section is designed to recover the government's costs that are incurred in regulating the safety of pipelines under programs that have been adopted pursuant to Congress's power to regulate interstate commerce. A law that requires a party to reimburse the government for costs associated with a program of regulation made necessary by that party's activities is, for constitutional purposes, properly regarded as imposing a "fee" rather than a "tax." That is clear from this Court's cases.

A. In the *Head Money Cases,* 112 U.S. 580 (1884), the Court considered the constitutionality of a statute requiring ship owners to pay a duty of 50 cents for every non-citizen that they transported to the United States. The money was used to pay the costs of administering the immigration laws. The Court, in rejecting a challenge to the law as an unconstitutional tax, noted

that "the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration" (*id.* at 595). In other words, the Court recognized that for constitutional purposes, a fee (as distinguished from a tax) may include exactions imposed on a party engaged in a particular activity in order to recover the costs imposed by that activity on the government. A tax, in contradistinction, is an exaction designed not to recover specific costs associated with a party's activities, but to raise revenue for the general support of the government. As the Court explained (*id.* at 595-596):

> The sum demanded of [the ship owner] is not * * * a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed.

The Court applied the same principle in *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935). In that case, a ship owner challenged a state rule imposing harbor fees for ships entering the Port of Mobile. The fees were used to police the harbor and to insure the safety of vessels in the harbor (*id.* at 263). The ship owner contended that the fees violated the Constitution's prohibition against tonnage duties (Art. I, § 10, Cl. 2), which forbids "all taxes and duties regardless of their name or form, * * * which operate to impose a charge for the privilege of entering, trading in, or lying in a port" (296 U.S. at 265-266). In rejecting that contention, the Court noted that the fees were used to fund government services that "are plainly devised to insure the safety of vessels and to

facilitate their use of the harbor" (*id.* at 264). As such, the Court found the fees were not taxes but exactions "for services rendered to and enjoyed by the vessel[s]" (*id.* at 266). Moreover, the Court found it irrelevant that the ship owner "neither asked for nor received any police service such as that which the state * * * regarded as the basis for the charge" (*ibid.*)[11] The Court concluded (*ibid.*):

> It is not any less a service beneficial to [the ship owner] because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it.

The lesson of the *Head Money Cases* and *Clyde Mallory Lines* is that the government is not imposing a "tax," in the strict sense used by the Constitution, when it requires an entity to pay the costs of a government program made necessary by that entity's commercial activities.[12] Such a fee is properly viewed as one of the costs of doing business. Here, appellee is in the business of transporting hazardous liquids through pipelines. That activity entails certain social costs, including the dangers to employees and the public from pipeline leaks, spills, and explosions. Congress has enacted the Hazardous Liquid Pipeline Safety Act in an effort to minimize those social costs, and has rationally determined that appellee should reimburse the government for its expenses of administering that program. See H.R. Rep. 99-300, 99th Cong., 1st Sess. 494 (1985) (quoting with approval testimony that "it is equitable for interstate pipeline operators and their customers to finance DOT's safety inspections, because the risks that these inspections reduce are entirely created by the pipeline operations"). Accordingly, Section 7005 is an exercise of Congress's "regulation of commerce"

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[11] Appellee has made a strikingly similar claim in this case (Mot. to Aff. 16)—"Mid-America has requested no service from DOT in exchange for which Section 7005 assessments are being charged."

[12] The Court applied the same general principle in an analogous context in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), when it held that fees imposed on state aircraft to recover the costs of federal aviation programs do not violate the constitutional rule of state immunity from federal taxation.

(*Head Money Cases,* 112 U.S. at 595). The fees collected under Section 7005 do "not go to the general support of the government (*id.* at 596); they go "to a special account at the U.S. Treasury" (J.A. 40) to be used solely to pay for the costs of the pipeline safety programs.

Appellee, again relying on *National Cable Television Ass'n,* argues (Mot. to Aff. 15-16) that an exaction is a tax unless the money is collected by the government in exchange for a "benefit * * * not shared by other members of society" (415 U.S. at 341). However, this Court's insistence in that case on receipt of a "benefit" can be explained by the language of the IOAA, which then authorized the imposition of fees only for "any work, service, * * * benefit, * * * license, * * * or similar thing of value or utility performed, furnished, provided, [or] granted by any Federal agency" (415 U.S. at 337 (quoting IOAA)). In any event, the language in *National Cable Television Ass'n* can be reconciled wtih the *Head Money Cases* and *Clyde Mallory Lines,* provided the word "benefit" is given a sufficiently broad meaning. In fact, the Court in *National Cable Television Ass'n* noted that the issuance of a license by a regulatory body may qualify as a "benefit." See 415 U.S. at 340. Thus, even under appellee's reading of *National Cable Television Ass'n,* Congress could plainly adopt the following scheme without exercising its taxing power: Congress could (a) make the transportation of hazardous liquids and gases through pipelines illegal without obtaining a license from DOT, (b) require DOT to establish a safety program designed, among other things, to ensure that all licensees comply with safety rules, and (c) authorize DOT to impose license fees on all licensees to pay the costs of administering the safety programs. The scheme that Congress has chosen differs from the one posited only in that it is more efficient because it eliminates the administrative costs associated with seeking and awarding licenses. The non-delegation doctrine, which is designed to ensure responsible government, certainly does not require Congress to create layers of laws to reach a result that may be obtained directly.

Moreover, pipeline operators clearly *do* receive direct and specific benefits from the government's safety programs; the

safety of their facilities is improved and their risk of being held liable for accidents is reduced. As the Court noted in *Clyde Mallory Lines,* "[t]he benefits which flow from the [government's safety programs] inure to all" who engage in the enterprise (296 U.S. at 266). Pipeline operators may believe that the costs under Section 7005 do not match the benefits that they receive, but that does not take away from the fact that pipeline operators receive a benefit.

B. There are many examples of fees imposed by the federal government similar to those required by Section 7005 that no one has even suggested are "taxes." The United States Customs Service charges fees for processing imported merchandise (19 C.F.R. 24.23). The Commodity Futures Trading Commission charges a fee to review a new futures contract (7 U.S.C. 16a). And the Environmental Protection Agency charges large fees to establish, raise, or lower tolerance levels for pesticides (40 C.F.R. Pt. 180). In all those cases, we do not consider the fees to be "taxes," even though importers might prefer to bring their goods into the United States without inspection, and manufacturers of pesticides might prefer to have no government regulation of pesticides. And in all those cases, we do not ask if the private benefits from the government programs are equal to the amount of the fees charged. Rather, we know that the exactions are fees (not taxes) because the private activity imposes direct costs on the government and the purpose of the exaction is to reimburse the government for those costs. The government is not requiring the private party to bear the general costs of government—*i.e.,* to subsidize the cost of unrelated programs. The government is simply requiring the private party to pay for the costs of the government services that they create. Accordingly, Section 7005 of COBRA does not establish a "tax" in the constitutional sense and thus does not—even under appellant's view of the non-delegation doctrine—call for strict scrutiny of the statute.

IV. *Section 7005 Is Constitutional When Measured Against The Established Standards For Determining Whether There Has Been An Excessive Delegation Of Legislative Power*

A. Section 7005 of COBRA is sufficiently precise to satisfy the established test for judging whether Congress's grant of discretionary authority to the Executive is excessive—*i.e.*, whether Congress "delineate[d] the general policy, the public agency which is to apply it, and the boundaries of [the] delegated authority" *American Power & Light Co.*, 329 U.S. at 105. Section 7005 plainly sets out Congress's policy and the component of the Executive Branch that is to implement that policy. Section 7005 directs, not merely allows, the Secretary of Transportation to assess and collect fees to cover the costs of administering the Hazardous Liquid Pipeline Safety Act and the Natural Gas Pipeline Safety Act. It requires that those fees be collected from certain persons operating facilities subject to the two pipeline safety statutes.[13] The Secretary is instructed to collect funds "sufficient to meet the costs of [the] activities" of the two programs as established by annual appropriations (§ 7005(d), 100 Stat. 141); thus Congress sets the total amount of fees to be collected each year. Nor does the Secretary exercise unbridled discretion in setting the amount of fees that each company must pay. Rather, the statute sets forth the *exclusive* factors that the Secretary may consider in creating the schedule—"volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines" (COBRA § 7005(a)(1)). And the statute requires the Secretary to create a fee schedule that is "reasonable" on the basis of those factors. See H.R. Rep. 99-300, *supra*, at 497 ("This subsection specifies that the formula must be 'reasonable.' ").

The statute also imposes a number of constraints on the Secretary. The Secretary may not collect fees that exceed 105% of Congress's annual appropriations for the pipeline safety programs. He may not collect fees from persons who are not sub-

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[13] Not all regulated entities are liable for fees; the statute does not authorize the Secretary to collect fees from operators of gas distribution facilities.

ject to either of the two safety Acts. He may not use the funds for purposes other than administering the two Acts. He may not set fees on a case-by-case basis,[14] and he may not consider any factors other than the three criteria set forth in the statute. Hence, Section 7005 clearly sets forth "an intelligible principle to which the [Executive] * * * is directed to conform" (*J. W. Hampton & Co.*, 276 U.S. at 409). This is not a statute that suffers from "an absence of standards for the guidance of the [Secretary's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" (*Yakus*, 321 U.S. at 426).

Nor is Section 7005 invalid merely because Congress did not itself establish detailed fee schedules. In *United States* v. *Rock Royal Co-Operative, supra,* the Court upheld a statute authorizing the Secretary of Agriculture to set milk prices. The court noted that Congress did not give the Secretary of Agriculture a "mathematical formula" but, rather, prescribed "the various factors to be considered by the Secretary" (307 U.S. at 577). Likewise, Congress in this case did not attempt to eliminate the Secretary's discretion entirely by legislating a specific formula; it reasonably set out the factors that the Secretary may consider in executing Congress's policy and left to "administrative judgment * * * the relative weights to be given to these factors." *Opp Cotton Mills, Inc.* v. *Administrator Wage and Hour Div.*, 312 U.S. 126, 145 (1941) (upholding statute authorizing Executive Branch to fix minimum wages).

The Magistrate concluded (J.S. App. 10a) and appellee argues (Mot. to Aff. 17-18) that Section 7005 is unconstitutional because the Secretary has discretion to select among three different statutory criteria in establishing a schedule of fees. But the Magistrate ignored the many limits that Congress placed on the Secretary before he may exercise some discretion in establishing a fee schedule that, in light of his experience in administering the two safety Acts, is reasonable. Whenever Congress

[14] The Magistrate clearly erred when he said that "the Secretary is given the power to *set* tax brackets or rates for *individual* pipeline companies" (J.S. App. 10a (second emphasis added)).

passes a statute conferring a measure of discretion on the Executive, at some level the agency charged with implementing the statute must exercise judgment in carrying out Congress's policy. But that fact does not give rise to a constitutional problem. As the Court noted in *Yakus,* 321 U.S. at 425-426, Congress "is not confined to that method of executing its policy which involves that least possible delegation of discretion to administrative officers." So long as the statute meets the standards set forth in *American Power & Light Co.* and *J.W. Hampton,* the Constitution's requirement of separation of powers is satisfied.

B. The validity of Section 7005 becomes even more evident when that provision is compared to other statutes that the Court has sustained against non-delegation challenges. The Court has upheld statutes authorizing the Executive to recover excessive profits earned on military contracts (*Lichter* v. *United States,* 334 U.S. at 785-786), to set maximum prices that are generally fair and equitable (*Yakus*, 321 U.S. at 427), to set just and reasonable rates for natural gas (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944)), to license radio communications as public interest, convenience, or necessity requires (*National Broadcasting Co.* v. *United States,* 319 U.S. at 225-226), to prohibit unfair methods of competition (*FTC* v. *R.F. Keppel & Bro.*, 291 U.S. at 310), and to approve consolidation of carriers when in the public interest (*New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 24 (1932)). When compared to those statutory provisions, the Executive authority created under Section 7005 is very modest indeed—and clearly constitutional.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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